SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1880~~ 1881

NO. ~~167~~ 217.

The State of Louisiana ex rel. The Southern Bank,
Plaintiff in Error.
v.
Edward Pilsbury, Mayor, et al.,
Defendants in Error.

In Error to the Supreme Court of the State of Louisiana.

BRIEF FOR PLAINTIFF IN ERROR.

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Brief for Plaintiff in Error.

STATEMENT.

This is a writ of error to review the judgment of the Supreme Court of the State of Louisiana, whereby it was ordered and adjudged that the demand of the plaintiff in error be rejected and dismissed, with costs.

The plaintiff in error filed his petition in the Third District Court for the Parish of Orleans, in December, 1877, praying for writs of *mandamus* and injunction against the Mayor and Council of the City of New Orleans.

The petition set forth as follows:

(1) That the relator, The Southern Bank, is a corporation established, domiciled and doing business in New Orleans.

(2) That in 1852 the General Assembly of the State of Louisiana passed an act approved February 23d, 1852, known as Act No. 71, whereby the City of New Orleans was declared liable for certain debts to be called "*The Consolidated Debt of New Orleans;*" and whereby the Common Council of New Orleans were directed *annually in the month of January, to pass an ordinance to raise the sum of six hundred thousand dollars, by a special tax on real estate and slaves, to be called The Consolidated Loan Tax.*

(3) That by act approved on the same day, and known as Act No. 72, the city was required in like manner to levy an additional tax of fifty thousand dollars annually, making the whole consolidated tax six hundred and fifty thousand dollars annually.

(4) That bonds were issued by the City of New Orleans on account of said Consolidated Debt, which became and were negotiable securities, of which bonds more than five millions have been redeemed out of the proceeds of said Consolidated Loan Tax, leaving more than four millions outstanding, of which said outstanding bonds, together with coupons maturing in the years 1876 and 1877, and all subsequent coupons till the maturity of said bonds, the relator owns upwards of six hundred.

(5) That in violation of the contract contained in said Acts of February 23, 1852, the Legislature of the State, by Act of March 12, 1874, undertook to repeal a part of said acts, by providing that the city should not levy any tax to redeem any of the outstanding bonds of the city.

(6) That in further violation of said contract the Legislature, by Act of March 6, 1876, enacted that no tax for the payment of bonds, or interest on bonds, other than that authorized by the preceding sections of the act (meaning thereby the bonds known as "Premium Bonds"), shall be levied either for the year 1876, or any year or years thereafter, by the City of New Orleans, and that all existing laws requiring or authorizing the

City Council to levy any tax for bonds or interest on bonds, *other than said Premium Bonds*, be repealed, and that no Court shall have power to enforce the levy or collection of any tax other than that provided in this act.

(7) That said last named Acts of March 12, 1874, and March 6, 1876, are unconstitutional and void, because they violate the contract embodied in the said Acts of February 23, 1852, but that the City Council of New Orleans have refused to perform the duties imposed upon them by said last named Acts for the years 1874, 1875, 1876 and 1877.

(8) That the city officers have been required to do their duty in the premises by levying and collecting the said Consolidated Loan Tax for each of the years in which it has not been levied, and that relator has also duly demanded payment of his matured coupons, all of which the said city officers have neglected and refused to do.

(9) That the city is now liable for a tax of $650,000 for the years 1874, 1875, 1876, 1877, less the amount of coupons of consolidated bonds paid in 1874 and 1875.

Finally, the petitioner prays for writs of mandamus and injunction against the city officers, the former commanding them to levy and collect the said special tax of $650,000 for the years above named, and the latter enjoining them from levying any other tax on real estate until the said special tax has been levied.

Upon this petition an alternative writ of mandamus was issued requiring the city to show cause why they should not comply with the prayer of the petitioner.

The city thereupon showed cause as follows:

(1) That by sundry Acts of the Legislature the Courts of the State are prohibited from issuing any writ to compel the levy of any interest tax other than that provided for in Act No. 31 of 1876.

(2) That the duty of the City Council is limited to the levy and collection of a tax not exceeding one and a half per cent. on

the dollar, to meet all expenses of the city, and to pay the interest on its bonded debt.

(3) That the city is expressly forbidden by Act No. 31 of 1876 (Premium Bond Act), from levying the tax demanded for any year.

(4) That the provisions of the 37th section of the Act No. 71 of 1852 are unconstitutional, null and void, because the objects of said provisions are not set forth or expressed in the title of said act, as required by Article 118 of the Constitution of 1845.

(5) That said tax is unconstitutional, null and void, and in violation of Article 127 of the Constitution of 1845, and Article 123 of the Constitution of 1852, because, first, said tax is to be assessed alone on real estate and slaves, and not also on personal property; and, secondly, because the rate per cent. in each municipality is to be in proportion to the original indebtedness of each.

By a supplemental answer the city repeats the same defenses in more ample terms.

Various parties, including the State of Louisiana, holders of Premium Bonds, taxpayers, &c., were allowed to intervene, agreeably to the practice of Louisiana, and various records and exhibits were made a part of the case.

Whereupon, on the 26th March, 1878, his Honor, the District Judge, gave judgment granting a peremptory writ of *mandamus*, and denying the writ of injunction.

Motions for a new trial were denied, whereupon appeals were taken from the judgment of the District Court to the Supreme Court of the State.

On the 30th December, 1878, the judgment of the Supreme Court was rendered by Justices Marr and Le Blanc, two of the three Judges thereof, the Chief Justice, Manning, dissenting.

The opinions of all the members of the Court appear in the record.

The judgment of the Supreme Court of Louisiana is as follows:

"It is therefore ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, and that the demand of relator be rejected and dismissed, with costs in both Courts."

To re-examine that judgment, the present writ of error has been taken.

Assignment of Errors.

The plaintiff in error assigns for error in said judgment;

(1) That the said Supreme Court erred in annulling and reversing the judgment of the said Third District Court, and in rejecting and dismissing the said demand of the relator, because the said relator established that he held certain Consolidated Bonds under a valid and irrepealable contract with the City of New Orleans, whereby he was entitled to have the levy and collection of the tax demanded in his petition.

(2) That the said Supreme Court erred in not granting the demand of the relator, because the said several defenses of the City of New Orleans to the said demand were each and all without merit in law, and the relator was entitled to the writ of *mandamus*, as demanded.

ARGUMENT.

It will be necessary to state carefully the history of the "Consolidated Debt" of the City of New Orleans, which is here brought in question.

(1) The City of New Orleans was originally incorporated by Act of the Legislature of Louisiana, approved February 17th, 1805.

2 Lislet's Gen. Dig. Laws La., p. 111.

(2) In 1836 the original act of incorporation, with subsequent amendments, was amended by an Act approved March 8, 1836, constituting in effect a new charter.

Acts La., 1836, p. 28.

By the first section of this act, the city was "divided into three separate sections, each with distinct municipal powers."

By the fourth section it was provided: "Each of said municipalities shall possess separate corporate powers, and are hereby declared to be distinct corporations, and shall possess generally such rights, powers and capacities as are usually incident to municipal corporations, * * * and in general shall possess and exercise within their respective limits all such powers, rights and privileges as are now possessed by the corporation of New Orleans."

(3) In 1852 the three municipalities created in 1836, together with the adjacent City of Lafayette, were consolidated into one municipality by Acts approved February 23d, 1852.

Acts La., 1852, Nos. 71 and 72, pp. 42, 55.

We find that at the time of the passage of the last-named acts, each of the five municipalities now referred to, namely: (1) the old City of New Orleans prior to 1836, (2) the three new municipalities created by the Act of 1836, and (3) the City of Lafayette, had a separate public debt; and one of the chief tasks attempted by the Acts of 1852 was the arrangement of these debts.

This is done in sections five and thirty-seven of the Act No. 71 of 1852, and sections of Act No 72 of the same date.

Section 37 of Act No. 71 is as follows:

SEC. 37. "*Be it enacted, etc.*, That the debt of the general sinking funds, commonly called the old city debt, and the debts of the three municipalities, whether in the form of bonds, notes, interest coupons, cash warrants, or any other species of obligations whatever, shall be *assumed and paid* by the City of New Orleans, and said city is hereby *declared liable therefor.* The Mayor, Comptroller and Treasurer, and the Chairman of the Finance Committee of the two Boards of the Common Council, shall constitute a commission to be called the Commissioners of the Consolidated Debt of New Orleans; and they shall have power to issue bonds of the City of New Orleans, having not more than forty years to run, with interest payable at such place as may be agreed on between said Commissioners and the parties to whom the bonds are issued, in semi-annual coupons, *in exchange for any bonds*, obligations, or debts of the old corporation, or of any of the municipalities, whether matured or not, or to sell the new bonds and apply the proceeds to the payment of the matured debts of the old corporation or of the municipalities, but to no other purpose. The bonds thus issued shall form a stock to be called the *Consolidated Debt of New Orleans.* At the time this act goes into operation, an exact and detailed statement of the indebtedness of the old corporation and of each municipality shall be filed in the office of the Comptroller, by the Secretary of the Board of Liquidators and the Municipal Comptrollers respectively, when the Commissioners of the Consolidated Debt shall proceed to divide the debt of the old corporation between the several municipalities in proportion to the assessed value of real estate within the limits of each, according to the State assessment roll for 1851. The amount thus apportioned to each, together with its individual indebtedness at the time this act goes into operation, shall constitute the separate debt of each municipality, No. 1, No. 2, No. 3. THE COMMON COUNCIL SHALL ANNUALLY, IN THE MONTH OF JANUARY, PASS AN ORDINANCE TO RAISE THE

SUM OF SIX HUNDRED THOUSAND DOLLARS, BY A SPECIAL TA ON REAL ESTATE AND SLAVES, TO BE CALLED THE CONSOLIDATED LOAN TAX, and the rate per cent. of said tax in each muncipality shall be in proportion to the indebtedness of each. *All ordinances, resolutions or other acts passed by said Council, after the first day of January in each year, shall be null and void, unless the ordinance imposing the Consolidated Loan Tax shall have been previously passed.* At the end of each and every year, any surplus of the Consolidated Loan Tax remaining in the treasury, after the payment of all the interest and the expenses of the management of said debt, shall be applied to the purchase, from the lowest bidder, of such bonds issued under this act, as have the shortest period to run; and the Common Council shall have the right of rejecting all bids demanding more than the face of the bonds, for which purpose, public notice shall be given by the Comptroller in the official gazette for thirty days, inviting proposals from bondholders for the sale to the city of the bonds herein described. From and after the passage of this act no obligation or evidence of debt of any description whatever, except those herein authorized, shall be issued by the City of New Orleans, or under its authority, nor shall any loan be contracted unless the same be authorized by a vote of a majority of the qualified voters of said city, which shall be taken in the manner prescribed by the City Council, after ten days proclamation by the Mayor, in the newspaper chosen by the Common Council; and no ordinance creating a debt or loan shall be valid, unless such ordinance shall prescribe ways and means for the punctual discharge, at maturity, of the capital borrowed or debt incurred, and such ordinances shall not be repealed until principal and interest of the capital borrowed or the debt incurred are fully paid and discharged."

In the same year, by Act No. 72, approved February 23, 1852, it was further enacted, as follows:

"SEC. 5. *Be it further enacted, &c.*, That the debt of the City of Lafayette shall be assumed and paid by the City of New Orleans, and the said City of New Orleans is hereby declared liable therefor; and the amount of said debt shall be ascertained, and its payment provided for and made in the same manner as the debt of each municipality of New Orleans is ascertained and provided for in the act to which this act is a supplement; and in raising annually the Consolidation Loan Tax for the payment of the debt of New Orleans, an additional sum of fifty thousand dollars shall be raised for the purpose of providing for the debt of the City of Lafayette, now added to that of New Orleans, so that the whole amount of the annual levy of taxes for the payment of the debt of New Orleans shall be six hundred and fifty thousand dollars."

In the process of consolidating the debt then provided for the present City of New Orleans issued, in 1852 and soon thereafter, about $10,000,000 of "consolidated" bonds.

Of this amount over $5,000,000 of bonds have been paid by means of the sinking fund established by the 37th section of Act No. 71, out of the surplus of the proceeds of the tax established by said section—the said tax having been levied and collected in full till 1874.

There remain outstanding, with interest unpaid since 1876, about $4,380,000 of "consolidated" bonds.

Between 1852 and 1876 the "Consolidated Debt" was recognized and reaffirmed by the following Acts, viz.:

1852, Nos. 72, 142; 1854, Nos. 108, 109, 110; 1855, No. 166; 1856, No. 164; 1859, No. 133; 1860, No. 3; 1869, No. 49; 1870, No. 7. 1872, No. 73; 1874, No. 53; 1876, No. 31.

It will not be amiss to state here, as a special evidence of the regard in which the "Consolidated" Debt was held by all parties until 1874, that by Act No. 7, approved *March 16, 1870*, the main object of which was to abolish the City of New Orleans as it had existed under the Act No. 71 of 1852 and subsequent acts, and to organize another City of New Orleans, it was, nevertheless, specially provided that the debt known as the *Consolidated City Debt*, existing under the provisions of the 37th section of said Act No. 71 of 1852, *shall be assumed and paid* by the City of New Orleans hereby incorporated, and *the said city was declared liable therefor;* and the Mayor, the Administrator of Finance and the Administrator of Public Accounts were invested with all the powers, functions and duties heretofore vested in other named officers by the Act of 1852 and subsequent acts in aid thereof.

In 1874 the Legislature and the city began a series of obstructive and repudiating acts in respect to this debt, which are the occasion of this litigation.

By Act No. 53, approved March 12, 1874, it was enacted as follows:

Be it enacted, &c., "That until the month of December, 1876, it shall not be the duty of the administrators of the City of New Orleans to estimate, levy or collect any tax for a sinking fund for the purchase of any of its bonds; *provided*, that this act shall in no wise be construed to hinder, delay or affect the prompt payment of the interest on the bonds of said city, as the same shall mature; and *provided further*, that *the validity of the consolidated bonds* of the City of New Orleans *is hereby recognized in all its integrity*, it being the object of this act to afford temporary relief to the taxpayers of New Orleans in the embarrassed condition of affairs, and not to detract from or impair the rights of the holder of said bonds, or others."

The effect of this act, it need hardly be pointed out, was to repeal or suspend, so far as an act could do so, that portion of the contract of 1852 which provided that the surplus of the annual tax of $650,000, after paying the interest on the Consolidated Debt, should be applied to *the purchase of such bonds of said debt as should have the shortest time to run.*

By Act No. 31, approved March 6, 1876, it was enacted as follows:

SECTION 7. "*Be it further enacted, &c., That no tax for the payment of bonds or interest on bonds, other than those authorized by the preceding sections, shall be levied, either for the year 1876, or any year or years thereafter, by the City of New Orleans*, and that all existing laws requiring or authorizing the City Council to levy any tax whatsoever for bonds or interest on bonds, other than said premium bonds, *be, and the same are hereby, repealed*, and it shall *be hereafter incompetent for any*

Court to mandamus the officers of said city to levy and collect any interest tax, other than that provided in this act, or in case of such mandamus, by receiver or otherwise, to direct the levy and collection of any such tax."

Since the passage of the last-named act no tax whatever has been levied or collected for the payment of the principal or interest of the Consolidated Debt.

In order to understand clearly the full scope and plan of the last-named act, its contents should be stated somewhat more at length.

Acts of 1876, p. 54: The preamble of the act recites that the debt of New Orleans, bonded and floating, is about $23,000,000; that property has depreciated so as to make a tax of five per cent. necessary to meet its liabilities, and that the city has devised a plan for the liquidation of its indebtedness.

The act then declares:

That the city authorities are "hereby authorized and directed to exchange all recognized and valid bonds of the City of New Orleans for bonds known as the 'Premium Bonds' of the City of New Orleans, in accordance with the plan adopted by the City Council, and approved by the Mayor, on the 25th May and 31st August, 1875;" said bonds to be dated September 1, 1875, and bear interest at five per cent. per annum from July 15, 1875.

Sections 2, 3, 4 and 5 provide means and methods for making the exchange provided for in the 1st section.

Section 6 provides for the levy of an equal and uniform tax on all property within the city sufficient to meet the principal and interest of *said Premium Bonds;* provided that the whole city tax for all purposes whatever shall not exceed the rate of one and one-half per cent. on the dollar of the assessed value of property in New Orleans.

Section 7, already quoted, forbids any tax for the purpose of paying any bonds or interest thereon *other than the said Premium Bonds*.

The remaining sections of the Act refer to matters of detail, and need not be quoted here.

To understand clearly, next, what the "Premium Bond" scheme is reference must be had to the ordinance of the city referred to in the first section of the last above named Act.

The Premium Bond scheme consists of an ordinance of the City of New Orleans, which provides that the whole debt of the city shall be converted into bonds of twenty dollars each, bearing what is called *eventual* interest at five per cent. per annum. No interest, however, is to be paid on any of said bonds until, by the workings of the scheme, the bonds themselves become due, whereupon principal and interest become payable at the same time.

The whole debt thus provided for is made redeemable, with accrued interest, *in semi-annual installments*, extending over a period of fifty years.

The particular bonds to be redeemed semi-annually are to be determined by a lottery wheel, or by drawings from the numbers of all the bonds, to be held in April and October. In the July and January following each drawing, the bonds drawn are to be paid, principal and interest, in full; and in addition, the sum of $50,000 is to be distributed, by like lottery, in the shape of prizes, among those of the holders of the drawn bonds whom chance should thus favor.

It is to be observed that the $50,000 thus disbursed in prizes, is in no sense a *payment* of the bonds or the interest thereon. The bonds are first to be paid, when drawn, principal and interest, in full, and then $50,000 of the tax is to be distributed *gratuitously in prizes!* It is easy to see that such a scheme is worse than a fraud upon the consolidated bondholders. It is an offense to public morality, and deserves the reprobation so justly bestowed upon lotteries by this Court in *Stone v. Mississippi* (101 U. S., 814).

And yet this was the feast to which the holders of the Consolidated Debt were invited, and on penalty of receiving nothing whatever on their debt, unless they acquiesced !!

We have now before us all the materials out of which this controversy has come, and we proceed to deal, one by one, with the questions which have been raised and are to be determined here.

We enter upon our argument in defense of the "Consolidated Debt," *with all the presumptions in our favor.*

In a very recent case—*Portsmouth Savings Bank v. Springfield* (4 Federal Rep., 276)—Judge Drummond remarked:

"All questions of doubt in relation to the validity of municipal bonds should be answered in favor of their validity, when the city has repeatedly recognized the validity of said bonds, and has paid interest on them for a series of years. * * * Under such circumstances, it should appear *beyond all doubt* that the bonds are void."

In the present instance, we venture to say that this Court has never considered a case in which all the presumptions arising from repeated recognitions of the validity of municipal bonds, were greater than here.

As LeBlanc, *J.*, was forced to say in his concurring opinion in this very case:

"For upward of twenty-five years the validity of these consolidated bonds has been, again and again, acknowledged by the Legislature and the Courts of this State, by the authorities of the City of New Orleans, and by those who, until 1874, have been taxed to redeem *those undisputed and indisputable obligations.*"

I.

This Court has jurisdiction of this case, and the motion to dismiss the writ of error should be denied.

A motion has heretofore been made to dismiss this writ of error, on the ground that no Federal question was involved.

This motion was, by the Court, postponed until the hearing of the case on its merits.

The principles governing the determination of the question of jurisdiction, on writ of error to a State Court, have been recently so thoroughly reviewed, and so clearly stated by the

Court, that it is only necessary to refer to a few of the late cases, without attempting to recapitulate the numberless authorities which preceded them.

The case of *Murdock v. City of Memphis* (20 Wall., 590), thus summarizes the law on this subject:

1. It must appear that a Federal question was raised and presented to the State Court; that it must have been decided adversely to the right asserted under the Constitution, laws, treaties or authority of the United States, or that such a decision was necessary to the judgment rendered.

2. These things appearing, this Court has jurisdiction and must examine the judgment so far as to enable it to decide whether this question was rightly adjudicated by the State Court.

3. If it finds that it was rightly decided, the judgment must be affirmed.

4. If it was erroneously decided, then this Court must further inquire whether there is any other matter in issue adjudged by the State Court, sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the Federal question. If so, the judgment must be affirmed.

5. But if it be found that the issue raised by the Federal question must control the whole case; or that there has been no decision by the State Court of any other matter which is sufficient of itself to maintain the judgment, then this Court will reverse that judgment, and will either render such judgment as the State Court should have rendered, or will remand the case to that Court for further proceedings, as the circumstances of the case may require.

Murray v. Charleston (96 U. S., 432), was a suit brought by a holder of city stock to recover the amount of a tax which the City Treasurer had retained out of interest due him, alleging that the tax was illegal. The answer of the city, among other matters, sets forth that the stock was duly assessed. The tax was levied under an ordinance passed in 1870, and repassed in 1871, imposing a tax of 2 % upon the value of all real and personal property in the city, and directing that the tax assessed on city stock shall be retained by the City Treasurer out of the interest payable thereon. The Charter of the city, passed in 1783, provided that the city could tax "the inhabitants of Charleston, or those who hold taxable property within the same."

The Court of Common Pleas tried the case without a jury, and found, among other facts, that the plaintiff was "not a resident of Charleston," but of Bonn, Germany.

The Court also found, as conclusions of law:

1. That the city had a right, under the Constitution and laws of the State, to tax the property of the plaintiff invested in stock issued by it.

2. That the city had a right to collect the tax by retaining the amount out of interest due thereon, and plaintiff cannot recover the same.

Judgment was rendered for defendant. Plaintiff appealed to the Supreme Court of the State, and in his notice of appeal set forth the following grounds:

1. That plaintiff, being resident in a foreign country, is not liable to the tax.

2. The laws of the State do not authorize the City Council to levy and retain a tax upon its own stock.

3. The tax impairs the obligation of the contract, and is, therefore, unconstitutional and void.

The Supreme Court of the State affirmed the judgment, and held that the stock was taxable property within the city, and that the right to tax it existed at the time of the contract, and entered into it as one of its elements.

"The obligation of the contract," says that Court, "was not impaired by the imposition of the tax, because it was a property which attached to the contract."

This Court, Strong, *J.*, says: "It was not until these ordinances of 1870 and 1871 were passed that it became the law of the State that such a tax could be imposed. The validity of the authority given by the State, as well as the validity of the ordinances themselves, was necessarily before the Court when the case was tried, and no judgment could have been given for the defendants without determining that the ordinances were laws of the State, not impairing the obligation of the contracts made by the city with the plaintiff."

P. 441: "The Supreme Court of the State understood a Federal question to be before it. One of the grounds of the motion of appeal was that the tax impaired the obligation of the contract, and was, therefore, unconstitutional and void. It is plain, therefore, that both in the Common Pleas and in the Supreme Court a Federal question was presented by the pleadings, and was decided. The city ordinances were in question on the ground of their repugnancy to the inhibition upon the States to make any law impairing the obligation of contracts, and the decision was in favor of their validity.

"It is not necessary to the jurisdiction of this Court that express reference should be made to some provision of the Federal Constitution. The form and mode in which the Federal question is raised is of minor importance."

P. 442: "The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right."

In *Keith v. Clark* (97 U. S., 454), it is held that where a case is decided in an inferior Court of a State on a single point which would give this Court jurisdiction, it will not be presumed here that the Supreme Court of the State decided it on some question of State law not found in the record.

Thus two main principles seem to be laid down by this Court as tests of its jurisdiction on writ of error to State Courts:

(1) If it appears by the record that no judgment could have been given for the defendant in error in the Court below, without necessarily passing on a Federal question.

(2) If it appears that a Federal question was called to the attention of the Court below, was passed upon adversely by the Court, and that there is no question of State law passed on by the Court below, sufficiently broad to have sustained the decision without passing on the Federal question.

We claim that we are clearly within both these tests.

1.

In the case at bar, it appears clearly that no judgment could have been given for the defendant without determining either:

(*a*) That the provision as to taxation was no part of the original contract with the city; either because it was not a valid provision of law, or because, if valid, it was nevertheless extrinsic to the contract; or,

(*b*) If it was a part of the original contract, then that it has been taken away by subsequent State legislation; or,

(*c*) That the right to a *mandamus* was not part of the contract, or has been taken away by valid legislation.

One or the other of these alternatives must have been decided by the Supreme Court of Louisiana. No other alternative is conceivable. Either of these alternatives presents a Federal question.

Stated in another form, they are:

(*a*) What was the contract between the city and its bondholders, which the Federal Constitution guarantees from impairment by State legislation?

(*b*) Has subsequent State legislation impaired that contract?

2.

The pleadings present Federal questions.

Those questions were decided adversely to the plaintiff in error, and adversely to the right set up under the Federal Constitution. No question of State law is presented by the record sufficiently broad to sustain the decision of the State Court without passing on these Federal questions.

(*a*) The pleadings present Federal questions.

The petition of the relator sets forth the provisions of section 37, of Act 71, of 1852, as to taxation; alleges that they constituted a contract between the city and the bondholders; that, in violation of that contract, the Legislature has passed an act entitled "An Act to postpone the levy and collection by the City of New Orleans, of a tax for sinking fund for the purchase of its bonds, &c., &c." (Act No. 53 of 1874); and "in further violation of the said section 37, which constituted as aforesaid a contract," the Legislature has passed an act entitled "An Act to adjust, regulate and provide for the bonded debt of the City of New Orleans, &c., &c., &c." (Act No. 31 of 1876), "the avowed object of which was to *impair*, if possible, *the obligation of said contract, and divest the rights* vested thereunder, by *prohibiting* said city *from levying any tax* for any year, under the provisions of said section 37, of Act No. 71, of 1852, by attempting to shackle judicial tribunals, and to repeal the said section and the amendment thereof" (see Record, p. 5).

"That both of the acts last named are *in direct conflict with Art. 1, sec. 10, Par. 1. of the Constitution of the United States*, as divesting the vested rights of relator under said Acts of 1852, and as *impairing the obligation of the contract* of relator with the said State and city, and should be held and declared to be unconstitutional, null and void, and of no effect" (p. 6).

The petition also sets forth that the Act of March 16, 1870 (No. 7, of 1870), attempting to repeal or modify to a certain extent section 37 of Act No. 71 of 1852, is an *impairment of the contract*, and is *unconstitutional, null and void* (pp. 6, 7).

The answer of the city sets forth as exceptions:

1st. That by the provisions of Act No. 5 of the extra session of 1870, and of the 7th section of Act No. 31 of 1876, the Courts of the State are absolutely prohibited from issuing any writ of *mandamus* to compel respondents to pay any debt not liquidated by judgment, or to compel them to levy and collect any interest tax, other than that provided for in said Act No. 31 of 1876 (see p. 12).

This exception *necessarily raised the question whether* those Acts of 1870 and 1876 were *an impairment of the contract* of 1852.

The 2d, 3d and 4th exceptions all rest on this Act of 1876, and also on Act No. 53 of 1874, which suspended the levy and collection of any tax for sinking fund under said Act No. 71 of 1852, until Dec., 1876.

These exceptions also clearly raise the question whether those statutes are *an impairment of the contract* (pp. 12, 13).

The answer proceeds to set forth, by way of defense—if the exceptions should be overruled—in addition to a substantial reiteration of the foregoing exceptions, that *the provisions* of section 37 of Act No. 71 of 1852, *herein sought to be enforced by mandamus*, are *unconstitutional*, *null and void*, because the *objects of* said provision are *not set forth*, expressed or referred to *in the title* of the Act, as required by article 118 of the Constitution of 1845, and that the *tax* provided for by said 37th section of said act of 1852, is unconstitutional, null and void, and violative of article 127 of the Constitution of 1845, and article 123 of the Constitution of 1852 (pp. 13, 14).

These pleas necessarily involve the inquiry, *what was the contract with the bondholders* which subsequent legislation cannot impair?

This is a Federal question.

The supplemental answer of the city merely enlarges and adds to the plea as to the *constitutionality of the tax* imposed by the Act of 1852 (pp. 15 to 18).

This raises the question in another form: What was the *contract?*

(*b*) The decision of the Supreme Court of Louisiana, dismissing the petition of the relator, *must have been*—even if there were no opinions in the record to show the grounds of the decision—*adverse to the petitioner on one or other of these Federal questions.*

No question of State law is presented by the record *sufficiently broad* to sustain the judgment aside from these Federal questions.

3.

The opinion of the Court below is certified up as part of the record, and that shows conclusively that the decision was squarely upon Federal questions.

(*a*) *The opinions of the Supreme Court of Louisiana constitute part of the record*, and can be examined by this Court to ascertain what was the ground of decision in that Court.

This has always been held to be the rule in cases coming up from Louisiana.

Armstrong v. Treasurer of Athens Co., 16 Peters, 281.
Grand Gulf R. R. Co. v. Marshall, 12 How., 165.
Cousin v. Blanc's Executors, 19 *Id.*, 202.

And since the Act of February 5th, 1867 (U. S. Rev. St., § 709), this is the rule in cases coming up from other States.

Murdock v. City of Memphis, 20 Wall., 590.

(*b*) The opinions show that the Supreme Court of Louisiana held:

1. The judgment of the United States Circuit Court in *Maenhaut et al. v. New Orleans* is not *res adjudicata*, and is not an estoppel in this suit (Opinion, p. 16).

2. The consolidated bonds were issued for a good and meritorious consideration. The validity of the bonds is questioned only on the ground that § 37 of the Act of 1852 is violative of article 118 of Constitution of 1845, which declared that "every law * * shall embrace but one object, and that shall be expressed in the title" (Opinion, pp. 17, 18; Concurring Opinion, p. 39).

3. Section 37 of Act of 1852 is *not* violative of Article 118 of Constitution of 1845 (Opinion, pp. 18, 19; Concurring Opinion, pp. 39, 40).

4. But it *is violative* of article 127 of Constitution of 1845, and article 123 of Constitution of 1852, as to *taxation being equal and uniform* (Opinion, pp. 21 to 27, p. 33; Concurring Opinion, pp. 39 to 41).

5. The contract between the city and the bondholders

was that the city should pay the amounts stipulated, principal and interest (Opinion, pp. 27, 28).

6. It was *not a part of the contract* that the city should issue no other bonds or evidences of debt during the 40 years of the running of these bonds (Opinion, pp. 28, 29).

7. The Legislature had the power to remove the restrictions imposed upon the city by the Act of 1852 as to the incurring of new obligations (Opinion, p. 29).

8. It was *not a part of the contract* that the amount of the debt should be apportioned to the inhabitants of the several municipalities, or that the quota to be paid by the inhabitants of each municipality should be fixed on the basis of the value of the real estate in each in 1851, or that the money to meet the interest *to pay the bonds* should be levied on *real estate and slaves alone* (Opinion, pp. 29 to 33; Concurring Opinion, pp. 39 to 41).

9. The *Act of 1856*, requiring all property to be taxed at the same rate on the same basis of valuation, *repealed the special tax* on real estate and slaves (Opinion, pp. 31, 33; Concurring Opinion, p. 40).

10. The repeal by the Act of 1856 was valid and *did not impair the obligation of the contract* with the bondholders (Opinion, pp. 31 to 33; Concurring Opinion, pp. 40, 41).

11. The *abolition of slavery* is such a change as was not contemplated by any of the contracting parties, and it would be equitable and just to relieve the owners of real estate of the additional burden, by subjecting to the payment of these bonds all the taxable property within the city limits, if that had not been done by the Act of 1856 (Opinion, p. 32).

12. The fact that at the time these bonds were issued the holders were entitled by law to compel payment by *mandamus, does not make the right to use that remedy a part of the contract*, so that they cannot be deprived of it by subsequent legislation (Opinion, pp. 34 to 38).

13. If section 7 of Act No. 31 of 1876 admits of no other interpretation than that it deprive any class of creditors of the city of the right to enforce their demands by judicial process, it would be void (Opinion, p. 38).

14. But if it is susceptible of the construction that it merely forbids creditors to proceed directly by *mandamus* to compel the levy and collection of a tax, and requires them to proceed under Act No. 5 of 1870, it would be valid (Opinion, p. 38).

15. If section 7 of Act No 31 of 1876 were unconstitutional, it would not follow that the entire act is unconstitutional (Opinion, p. 38)

It appears conclusively from the opinion of Mr. Justice Marr, and the concurring opinion of Mr. Justice Le Blanc, as thus analyzed, that the Supreme Court of Louisiana (1) *decided this case on strictly Federal questions*, and (2) decided those questions *adversely to the rights asserted by the plaintiff in error under the Federal Constitution.*

We proceed, therefore, to a discussion of the merits.

II.

As to the defense, that the Act of 1852, creating the Consolidated Debt, is unconstitutional, on the ground that its title did not sufficiently state the object of the Act, and on the ground that it embraced more than one object.

This question has been conclusively settled by the decision of the Supreme Court of Louisiana in their opinion in this case, as reported in 31 La. An., 1.

That Court held that the act was constitutional in these respects, and that the "consolidated bonds" were *valid obligations of the city.*

The Court says (p. 11): "From the history which we have given of the consolidated bonds, it is manifest that they were issued for a good and meritorious consideration. They represented what remained unpaid of the old city debt, contracted prior to the separation in 1836, and the debts of the several municipalities contracted during the separation.

"The consolidation of the City of New Orleans made it necessary for the city to assume these debts, because, by the consolidation, the city took and became the owner and administrator of all the means and resources of the municipalities for paying debts, and the municipalities ceased to exist as separate bodies. Assuming those debts, it was necessary for the city to put them in a shape that would be acceptable to the creditors, and would give the city, the new debtor, time to provide the means of paying them. Bonds payable at a distant day, bearing interest, constituted the only form of obligation that would meet the emergency; and they are the most usual and convenient form of municipal obligations. * * * The title (of the Act of 1852) is an 'Act to consolidate the City of New Orleans, and provide for the government and administration of its affairs.' The *single object* of the act was *to consolidate the City of New Orleans*, to bring back its dissevered members, and to put an end to their separate existence by uniting them under one government. The consolidation required some provision for the government and administration of the affairs of the new corporation thus created; and *all the details and particulars* in the body of the act, *germane to the one object*, the single purpose contemplated by the Legislature, &c., without which that purpose could not have been accomplished, *are sufficiently indicated and expressed in the title*. The immediate cause of the consolidation was the utter inability of the municipalities to pay the debts for which they were separately bound, and to substitute the city, in all things pertaining to municipal government, for the municipalities. The issuing of these bonds was an act of administration of the affairs of the city devolved upon it by the consolidation, and necessarily pertaining to the government of the city."

And again, p. 16: "Counsel for the relator insists that section 37 of the Act of 1852 is a contract binding on the State, the city and the bondholders; *unquestionably there was a contract*, and a very simple one, between the city and the bondholders. The city assumed the debts for which the several municipalities and Lafayette had been liable; and it executed its bonds, bearing interest, payable semi-annually for the amount. The city also undertook to raise the sum of $650,000 per annum, to pay the accruing interest, and to provide for the gradual extinction of the bonds. The bonds were the evidence of the contract; the contract was to pay the amount stipulated, principal and interest. That was the obligation of the contract; and that obligation is placed under the protection of the Constitution of the United States, as well as that of the Constitution of the State of Louisiana."

And Le Blanc, *J.*, in his concurring opinion, p. 22, says: "For upwards of 25 years the validity of the bonds held by relator had been again and again acknowledged by the Legislature and the Courts of this State, by the authorities of the City of New Orleans, and by those, who, until 1874, have been taxed to redeem those *undisputed and indisputable obligations.*"

This decision of the highest Court of the State would be an authoritative construction of the Constitution and statute of Louisiana now in question, and would be conclusive in this Court under the well-settled rule applied by this Court, even if it had been decided in another case.

Shelby v. Guy, 11 Wheat., 361.
Green v. Neal, 6 Pet., 291.
Leffingwell v. Warren, 2 Black., 597.
Town of South Ottawa v. Perkins, 94 U. S., 260.

But it is certainly conclusive on defendant in error in this case.

There remain the following questions which seem to require discussion in this case:

1. Was the provision of Section 37 of the Act of 1852 in question, as to taxation for the payment of interest and for the redemption of these bonds, *constitutional and valid?*

2. Did that provision form a part of the contract under which these bonds were issued, so as to put it beyond the power of the Legislature to impair it?

3. Even if the particular method prescribed for levying the tax were unconstitutional and void, would it follow that the requirement to levy a tax of $650,000 a year was void?

4. Has the abolition of slavery effected such a change as destroys, or justifies the repeal of, the provision for a special tax on real estate and slaves?

5. If the provisions of the Act of 1852 for a special tax were void, or if they have been repealed by a valid repealing act, is not the relator still entitled to a *mandamus* to compel the levy of a tax to pay his overdue coupons?

6. Can the State, by legislation subsequent to the contract, take away the remedy by *mandamus*, if such remedy existed at the time the contract was made?

7. Is it necessary for the relator to obtain a judgment against the city before applying for a *mandamus?*

Of these questions in their order.

III.

Was the provision as to taxation contained in section 37 of the Act of 1852 unconstitutional and invalid?

The provision of the State Constitution here in question is as follows, being Article 127 of the Constitution of 1845, or Article 123 of the Constitution of 1852:

"Taxation shall be equal and uniform throughout the State. All property on which taxes may be levied in this State shall be taxed in proportion to its value, to be ascertained as directed by law, and no one species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied; the Legislature shall have power to levy an income tax, and to tax all persons pursuing any occupation, trade or profession."

1.

The first ground of inequality and want of uniformity urged is, that the tax is directed to be levied on real estate and slaves, and that personal property and incomes are not directed to be included in the levy.

This objection cannot be maintained. The Supreme Court of Louisiana, in the case of *The State of Louisiana v. Poydras* (9th An., 167), with reference to the tax upon successions falling to non-resident heirs, say:

> "To be uniform, taxtion need not be universal. Certain objects may be made its subject, and others may be exempt from its operation. Certain occupations may be taxed, and others not, or some occupations may be taxed for a greater amount, and others for a less; but as between subjects of taxation in the same class, there must be an equality."

That is to say, the Supreme Court have said that, according to Article 123 of the Constitution of 1852, it was competent for the Legislature to classify property, and lay a tax upon one class and exempt another, and that the provisions of the Constitution were complied with, provided that all property in the same class was taxed equally and uniformly.

The Supreme Court of this State have settled the question, then, that this tax, in so far as it was directed to be levied upon land and slaves, and not upon any other species of property, was constitutional and valid.

2.

But it is objected that the tax is not uniform and equal throughout the entire locality or district upon which the same was by the Legislature put.

On this point the decision of the Supreme Court of Louisiana, in the case at bar, is not conclusive upon this Court.

(*a*) Because it is a *construction of a contract* embodied in a legislative act of the State, and this Court will always inquire whether such a contract has been rightly construed by the State Courts.

(*b*) Because this latest decision of the State Court is at variance with its former decisions, on the faith of which the bonds have been negotiated.

In the case at bar, the Supreme Court of Louisiana held that the 37th section of the Act of 1852 was unconstitutional and void, on the ground that the tax therein authorized and directed was not equal and uniform throughout the State, as required by the Constitution of the State.

(*a*) *Where a question involved in the construction of State statutes practically affects the remedies of creditors* this Court will exercise its own judgment on the meaning of the statutes, irrespective of the decisions of the State Courts, and if it deems them wrong, it will not follow them.

Butz v. City of Muscatine, 8 Wall., 575.
Township of Pine Grove v. Talcott, 19 Wall., 666.
Olcott v. Supervisors, 16 Wall., 678.
Town of Venice v. Murdock, 92 U. S., 494, 502.

The general rule that the construction given by State Courts to State laws and constitutions is binding and conclusive upon the Federal Courts *does not apply to cases where this Court is called on to interpret contracts*, though such contracts have been made in the form of State statutes.

Jefferson Branch Bank of Ohio v. Skelly, 1 Black. 436.
University v. People, 99 U. S., 309.
Wright v. Nagle, 101 U. S., 791.

(*b*) Until the decision in this case the Supreme Court of Louisiana had, by a long course of decisions, held that the provisions in the State Constitution, as to taxation being equal and uniform, *did not apply to municipal taxation.*

Second Municipality v. Duncan, 2 An., 182 (1847).
Lafayette v. Cummins, 3 An., 673 (1848).
Buffington v. Dinkgrave, 4 An., 548 (1849).
Yeatman v. Crandall, 11 An., 220 (1856).
The New Orleans Draining Co., 11 An., 338 (1856).
Jamison v. City of New Orleans, 12 An., 346 (1857).
Wallace v. Shelton, 14 An., 503 (1859).

In the case of *Second Municipality v. Duncan* (2 An., 182) the municipality imposed a special tax of one per cent. on all real estate in its limits, which was resisted on the ground that it was in conflict with the clause in question of the Constitution of 1845.

The Court, by Eustis, *C. J.*, says:

"The tax itself is said to be unconstitutional, it being in conflict with article 127 of the Constitution of 1845.

"That article, by its very terms, applies to *State*, and not to *municipal* taxes. It provides for the equality and uniformity of taxation throughout the State. * * *

"The framers of this Constitution had before them the condition of the municipalities of New Orleans, with their debts, their abuses and their wants; and their corporate existence is recognized and continued as to certain public rights by an express provision. The jurisprudence under which the present system of taxation had grown up was before them, and the power of remedying the evils of misgovernment was left in *statu quo* with the Legislature, and the Convention *confined itself to providing for the State Government, leaving the municipal bodies*, as it is believed sound policy justified, *under legislative control.*"

It is to be remembered here that Chief-Justice Eustis was not only an eminent jurist, but a member of the Convention that framed the Constitution of 1845.

Duncan's case was decided in 1847, and it is now said that the Constitution of 1845 postponed the operation of the 127th section *until after the year 1848.*

But in 1848, in the case of *City of Lafayette v. Cummings* (3 An., 673), the decision in Duncan's case was reaffirmed and approved, as was also done in *Buffington v. Dinkgrave* (4 An., 548), decided in 1849.

In *Lafayette v. Cummings*, Chief-Justice Eustis, again speaking for the Court, says:

"It is contended that the imposition of the tax attempted to be executed is contrary to the 127th Article of the Constitution, which provides for the equality and uniformity of taxation throughout the State.

"In the case of *Duncan v. 2d Municipality*, this question, after very thorough argument, was determined by this Court, and *the article was held applicable only to State, and not to municipal taxes*".

And in *Buffington v. Dinkgrave*, the same Court said:

"We will dismiss the ground of unconstitutionality by reason of the inequality of the tax, with a single reference to the cases of *2d Municipality v. Duncan*, and *City of Lafayette v. Cummings, in which the same question was thor-*

oughly examined and decided adversely to the plaintiff's pretensions."

All these decisions had been made and were in force when the Consolidation Act of 1852 was passed. They were, therefore, *rules of property*, and part of that act.

In 1852 the new Constitution, in its 123d section, reproduced section 127 of the Constitution of 1845.

In 1854 arose the case of *2d Municipality v. White* (9 An., 446), in which the Court were called upon to pass upon the 123d section of the Constitution of 1852, and the Court held that the section requiring equality and uniformity of taxation was applicable to the case of a municipal tax laid to pay for opening a street.

But the Court was not unanimous, two Judges dissenting, one of whom was Slidell, *C. J.*, who said he considered the case settled by Duncan's case. Judge Slidell was a member of the Court which, seven years before, pronounced the decision in Duncan's case.

But in 1856 the question again arose and White's case was clearly overruled. In *Yeatman v. Crandell* (11 An., 220), the Court, after quoting the article of the two Constitutions, says:

"*This article refers to State taxation, in its proper sense, for general or State purposes.* When it says that taxation shall be equal and uniform throughout the State, it points directly to its object, *which is to regulate the mode of filling the State Treasury.* It does not take away the power of making local assessments for local improvements. * * * It is notorious that an acre of land pays twice as great a tax for local purposes in one parish as an acre of equal value pays in another parish. Yet no one thinks the Constitution infringed by such a state of things. It is enough that State taxes, for State purposes, be equal and uniform, and *ad valorem.*"

What is specially significant in this latter case is the fact that one of the Justices who joined in the decision of White's case formally renounced his opinion, and said: "I yield my former impressions on this point the more readily because the Supreme Court, which sat under the Constitution of 1845, and five of the seven Judges with whom I have sat upon this bench, have concurred in holding that the article in question was not intended to apply to municipal or local taxation for local improvements."

Chief-Justice Manning was, therefore, fully warranted in saying, in his dissenting opinion in this case, in the Court below:

"There is, therefore, no doubt—there can be no doubt—about the judicial construction of the constitutional requirement of uniformity and equality of taxation. It may be argued that it was an erroneous construction, but that *it was the actual construction made by two Courts interpreting identical articles in two Constitutions*, has been shown by producing the language of those Courts. Nor can it be said that the question had not proper consideration. It was not settled without controversy. And the circumstances attending the decision of Yeatman's case impart great weight to the manner in which White's case was overruled, and evinced *the deliberation which attended the unanimous reëstablishment* of the earlier doctrine, that *municipal taxation was not referred to nor included in* the constitutional prohibition of inequality of taxation."

The case of *Layton v. New Orleans* (12 An. 515) is referred to as adverse to our claim upon this point.

We submit that it is in no respect adverse.

In 1856 the Legislature saw fit to order *the consolidated loan tax*, as well as other city taxes, to be levied on all kinds of property. This act gave rise to the case of *Layton v. New Orleans*, in which the plaintiff asked for an injunction restraining the collection of the tax on the ground that the law equalizing the tax on all property in the city was in violation of the Act of 1852, as impairing vested rights.

Let it be remarked carefully that the claim was, not that there was a want of uniformity, but that there was uniformity, whereas the Act of 1852 required the tax to be levied on "*real estate and slaves.*"

Now, how could the tax in question be a violation of vested rights, *provided* it adequately carried out the contract to raise a tax of $650,000 annually for the benefit of the Consolidated Debt? What ground of complaint could a consolidated bondholder have, provided his contract were faithfully kept? The State Constitution did not *forbid* equality and uniformity of taxation for city purposes. Nor did the contract—the Act of 1852 creating the Consolidated Debt—forbid the tax from being levied on *all* property. So long as the city levied and collected the requisite tax, the creditor has no motive and no right to complain, at least upon the ground that the mere mode of taxation impaired his contract.

The Court, therefore, rightly upheld the tax, but that decision did not hold and cannot be made to cover the doctrine that the tax of 1852 was unconstitutional because it was not equal and uniform.

(*c*) But it is now said that the decisions of the Supreme Court of Louisiana, on which we rely, are *dicta*.

Our answer is that an examination of the cases will show that they are not *dicta*, but authoritative decisions.

Our second answer is, that even if the earlier decisions of the Supreme Court of Louisiana had been mere *dicta*, they would, even as *dicta*, be followed by this Court in view of the fact that the bonds issued under the Act of 1852 were negotiated on the faith of those *dicta*, and in view of the fact that the *Legislature and the people of Louisiana acquiesced* for years in this construction of the statute, and, in fact, levied the taxes without question until 1876.

The *practical construction put upon a statute by the Executive and Legislative Departments* of a State has been *held* to be of as much importance in determining the validity of a statutory contract of a municipalty or of a State, as is the judicial construction.

Union Ins. Co. v. Hoge, 21 How., 35.
Rogers v. Goodwin, 2 Mass., 475.
Packard v. Richardson, 17 Mass., 122.
Attorney-Gen. v. Bank Cape Fear, 2 Ired. Eq., 71.
M'Keer v. DeLancey, 5 Cranch, 22.
United States v. Lytle, 5 McLean, 9.

The labored effort of the learned Judge, who writes the majority opinion in this case in the Court below, to distinguish the preceding Louisiana cases, seems to us, with all due respect, to be utterly futile. The very learned and able dissenting opinion of Chief-Justice Manning (31 La. An., p. 24), shows most conclusively that the law, up to that time, was *settled by authoritative decisions* in favor of the constitutionality of this provision as to taxation.

(*d*) It is equally well settled in this Court that where the later decisions of a State Court are at variance with the earlier decisions, upon the faith of which bonds have been negotiated, this Court will follow the earlier decisions rather than the later.

Gelpcke v. Dubuque, 1 Wall., 175.
Havemeyer v. Iowa County, 3 Wall., 294.
Thompson v. Lee County, 3 Wall., 327.
Lee County v. Rogers, 7 Wall., 181.
Chicago v. Sheldon, 9 Wall., 50.
Olcott v. Supervisors, 16 Wall., 678.
Fairfield v. County of Gallatin, 100 U. S., 47.

Mr. Chief-Justice Waite thus forcibly states the rule in the recent case of *Douglass v. Pike County* (101 U. S., 686): "As a rule we treat the construction which the highest Court of a State has given a statute of the State as a part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected. * * * * The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and *a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.*"

(*e*) The construction put upon the Constitution of Louisiana by the earlier decisions of the Supreme Court of that State are *in accordance with authority in other States*, and are in accordance with sound reason.

In *Gilkeson v. The Frederick Justices* (13 Grat., 577), the Court was called upon to construe a provision of the

Constitution of Virginia, which prescribed that "*taxation shall be equal and uniform throughout the Commonwealth*, and all *property* other than slaves, *shall be taxed in proportion to its value*."

The Court held that this provision applied solely to the *Commonwealth's revenue*, and to taxes for Commonwealth purposes, and had *no application to taxes for county or municipal purposes.*

In *Washington v. The State* (13 Ark., 752), the Court considered the meaning of section 2 of the article as to Revenue of the Constitution of Arkansas of 1836. That section provided that "*All property subject to taxation shall be taxed according to its value*—that value to be ascertained in such manner as the General Assembly shall direct; *making the same equal and uniform throughout the State. No one species of property*, from which a tax may be collected, *shall be taxed higher than another species of property of equal value*." The Court held (p. 761) "that the constitutional provisions concerning revenue were *intended to apply to State revenue*, and were *not applicable to taxes levied for county purposes*."

The same point was *held* in

McGehee v. Mathis, 21 Ark., 40.

3.

But it is claimed, by the defendant in error that a certain Act of 1856 has (1) repealed, in effect, the provisions of the 37th section of the Act of 1852; and (2), that that act and other subsequent acts providing for the levy of the *consolidated bond tax* upon *all* the property of the city, have been so far acquiesced in by the relator and his co-bondholders as to estop them now from setting up any right to enforce the provisions of the 37th section as to the tax.

We maintain that this is an error.

There are two Acts of 1856 on this subject—and it is not entirely clear, at different times, to which reference is here made—but neither of these acts sustain defendant in error's position.

The first act is No. 93, entitled "An Act to limit and equalize municipal taxation in the City of New Orleans."

Acts of La., 1856, p. 68.

Section 1 of this act provides:

"That from and after the passage of this act, it shall not be lawful for the Common Council of the City of New Orleans to levy any tax exceeding one dollar and fifty cents on every hundred dollars of the assessed valuation of real estate and slaves situated within the limits of the city, and subject to municipal taxation therein; *provided, that such an amount shall be raised thereby as shall be sufficient to pay the interest of the present city debts, together with the gradual reduction of the capital of the consolidated debt, as required by the laws now in force.*"

In what respect, or what sense, we ask, is this section a repeal of the 37th section of the Act of 1852?

It is a mere fixing of an aggregate limit of city taxation on real estate and slaves, *provided* this limit is sufficient to discharge all the obligations of the consolidated debt.

In the 2d section of this act it is provided that it shall not be lawful for the city to levy any tax on real estate, or slaves, or movables, which shall not be equal and uniform within the limits of, or through the several districts of said city, as now organized.

Section 3 repeals all acts or parts of acts inconsistent with this act.

Here, then, we have an act which, in terms—

(1) Limits the whole city tax on real estate and slaves to one and one-half per cent., with the condition, however, that this limit shall be sufficient to pay the interest and redeem the principal of the consolidated debt, "as required by the laws now in force"—meaning, of course, principally the Act of 1852.

(2) Forbids the city to levy any tax on real estate, slaves or movables, which shall not be uniform throughout the city.

(3) Repeals all inconsistent acts.

In other words, the act amounts (1) to a change of the mode of levying the tax, and (2) to a new provision for the full discharge of the city's obligations towards the consolidated debt as fixed by the Act of 1852.

Now, while this act is in terms a repeal of the 37th section of the Act of 1852, so far as the mode of raising the tax is concerned, how could a consolidated bondholder complain of it, or why should he, *so long as no duty towards him imposed by the Act of 1852 remained unfulfilled?*

Though the act were unconstitutional, as changing his contract, by what means could he assail it, so long as he received his interest and principal according to his original contract?

If the act resulted in his failure to receive all that was due, when it became due, he could complain; or probably, if the act imminently threatened to result in injury to his bonds, he could have a remedy; but we see no practical cause of complaint such as to warrant an action on his part to set aside the offending act, as long as the city promptly complied with all the conditions of his bonds.

To call his failure to contest the repealing Act of 1856 *acquiescence*, such as to work an estoppel is, we confidently submit, a total error and misapprehension of the situation.

Whenever, however, under cover of the Act of 1856, or of any subsequent act, the city failed to perform its duty, the bondholder could assail the act and insist on the fulfilment of his original contract.

It matters not, in law or in practice, to the bondholder *how* the tax is levied and collected, so long as it *is* collected and paid to him. The bondholder *was compelled to be silent and to acquiesce* till 1876, when the city refused to pay his principal or interest.

4.

But it is said, also, that section 42 of Act No. 164 of the Acts of 1856 repealed the provisions of the Act of 1852 as to this *special* tax.

This act, in section 42, provided that the Common Council should, "for the purposes of this act" (*i. e.*, the Act of 1856), in each year lay an equal and uniform tax upon all property, real and personal, in said city; "but said tax, *added to the Consolidated Loan Tax*" and to the special tax for payment of interest on bonds issued for subscriptions to the stock of certain railroads, "shall not, *in the aggregate*, be more than one dollar

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In what respect, or what sense, we ask, is this section a repeal of the 37th section of the Act of 1852?

It is a mere fixing of an aggregate limit of city taxation on real estate and slaves, *provided* this limit is sufficient to discharge all the obligations of the consolidated debt.

In the 2d section of this act it is provided that it shall not be lawful for the city to levy any tax on real estate, or slaves, or movables, which shall not be equal and uniform within the limits of, or through the several districts of said city, as now organized.

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(2) Forbids the city to levy any tax on real estate, slaves or movables, which shall not be uniform throughout the city.

(3) Repeals all inconsistent acts.

In other words, the act amounts (1) to a change of the mode of levying the tax, and (2) to a new provision for the full discharge of the city's obligations towards the consolidated debt as fixed by the Act of 1852.

Now, while this act is in terms a repeal of the 37th section of the Act of 1852, so far as the mode of raising the tax is concerned, how could a consolidated bondholder complain of it, or why should he, *so long as no duty towards him imposed by the Act of 1852 remained unfulfilled?*

Though the act were unconstitutional, as changing his contract, by what means could he assail it, so long as he received his interest and principal according to his original contract?

If the act resulted in his failure to receive all that was due, when it became due, he could complain; or probably, if the act imminently threatened to result in injury to his bonds, he could have a remedy; but we see no practical cause of complaint such as to warrant an action on his part to set aside the offending act, as long as the city promptly complied with all the conditions of his bonds.

To call his failure to contest the repealing Act of 1856 *acquiescence*, such as to work an estoppel is, we confidently submit, a total error and misapprehension of the situation.

Whenever, however, under cover of the Act of 1856, or of any subsequent act, the city failed to perform its duty, the bondholder could assail the act and insist on the fulfilment of his original contract.

It matters not, in law or in practice, to the bondholder *how* the tax is levied and collected, so long as it *is* collected and paid to him. The bondholder *was compelled to be silent and to acquiesce* till 1876, when the city refused to pay his principal or interest.

4.

But it is said, also, that section 42 of Act No. 164 of the Acts of 1856 repealed the provisions of the Act of 1852 as to this *special* tax.

This act, in section 42, provided that the Common Council should, "for the purposes of this act" (*i. e.*, the Act of 1856), in each year lay an equal and uniform tax upon all property, real and personal, in said city; "but said tax, *added to the Consolidated Loan Tax*" and to the special tax for payment of interest on bonds issued for subscriptions to the stock of certain railroads, "shall not, *in the aggregate*, be more than one dollar and fifty cents on one hundred dollars of valuation, except in case of invasion or insurrection: *provided, it be sufficient to pay the interest on the consolidated debts* and railroad bonds issued by the City of New Orleans."

It seems very clear that the meaning of this Act of 1856 is not to repeal the special tax of 1852 upon real estate and slaves, but to provide an *additional tax* on *all property* for general municipal purposes, with the proviso that the general tax, "*added to*" the special tax, and the special tax for interest on railroad bonds, should not exceed $1.50 on the $100; and provided, also, that this limitation shall not avail if the effect is to reduce the special tax or the supplementary general taxes in any year so as not to raise sufficient revenue to pay the interest on the consolidated debts and railroad bonds.

It matters not how the City of New Orleans did, in fact, raise and apportion its taxes under this Act of 1856; *the meaning of the act is clear*, and it *reaffirms the special tax imposed by the Act of 1852* for the Consolidated Debt.

IV.

Taking it as established, then, that the provisions as to taxation in Section 37 of 1852 were constitutional and valid, we proceed to inquire whether those provisions formed part of the contract with the bondholders which the State could not repeal by subsequent legislation.

This question would seem to be most emphatically settled in the affirmative by the decisions of this Court.

In *Von Hoffman v. Quincy* (4 Wall., 535), this Court holds that where a statute has authorized a municipal corporation to issue bonds and to exercise the power of local taxation by a *special tax* in order to pay them, and persons have bought bonds issued accordingly, the *power of taxation thus given is a contract* within the meaning of the Constitution, and *cannot be withdrawn until the contract is satisfied*. A subsequently passed statute which repeals or restricts the power of taxation so previously given, is, as to such bonds, a nullity. *It is the duty of* *the corporation to impose and collect the tax in all respects as if the second statute had not been passed.* If it does not perform this duty, a *mandamus* will lie to compel it.

And see to the same effect—

Butz v. City of Muscatine, 8 Wall., 575.
Milner's Creditors v. Pensacola, 2 Woods, 641, and cases there cited.
Commissioners v. Rather, 48 Ala., 446, and cases there cited.
Sibley v. City of Mobile, 3 Woods, 535.

V.

Even if the particular method prescribed for levying the tax was unconstitutional and void, it would not follow that the requirement to levy a tax of $650,000 a year was void.

The provision for the raising of $650,000 a year, for payment of interest and for redemption of principal, was *a most substantial part of the contract* with the city. It gave the bondholders a very valuable guarantee for the ultimate payment of the bonds. The bondholders took their bonds on the faith of this guarantee. Now, if the particular method which the Legislature provided for levying the tax was unconstitutional and void, *the contract to raise the sum of $650,000 a year still remains*, and must be performed by means of the general taxation of the City.

VI.

But it is claimed that the abolition of slavery is such a change as was not contemplated by the contracting parties, and justifies the repeal of the special tax on real estate and slaves.

1.

But this is *one of the contingencies* which the city *ought to have forseen and provided against.*

Suppose it had been a tax on real estate and *cotton.* Would the entire failure of the cotton crop relieve the city from collecting the tax from the real estate? Clearly not. Or suppose that the cotton crop of the State should be deprived of all value by the discovery of some cheaper and equally serviceable substance, either natural or artificial, so that the planters should be forced to suspend entirely the cultivation of cotton, and put all their soil into cane growing, would this relieve the real estate? Or suppose it had been a tax on real estate and horses, and suppose the Legislature or Congress should require all the horses in the State to be killed to prevent the spread of an epidemic, would this relieve the real estate?

The contract of the city is express and positive. It agrees to raise in each year the sum of $650,000, not one-half upon real estate and one-half upon slaves, but $650,000 upon *real estate and slaves.*

The general subject of the effect upon a contract of a contingency rendering performance impossible is thus treated by Parsons in his work on Contracts, Vol. 2 (6th Ed.), *672:

"It has been somewhat questioned how far the impossibility of doing what a contract requires is a good defense against an action for the breach of it. If the performance of a contract becomes impossible by the act of God, that is, by a cause which could not possibly be attributed to the promisor, and this impossibility was not among the probable contingencies which a prudent man should have forseen and provided for, it should seem that this would be a valid defense. But to make the act of God a defense it must amount to an impossibility of performance by the promisor; mere hardship or difficulty will not suffice. *So, the non-performance of the contract is not excused by an act of God, where it still may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible.* If one for a valid consideration promises another to do that which is in fact impossible, but the promise is not obtained by actual or constructive fraud, and is not on its face obviously impossible, there seems no reason why the promisor should not be held to pay damages for the breach of the contract; not, in fact, for not doing what cannot be done, but for undertaking and promising to do it. So, if it becomes impossible by contingencies which should have been foreseen and provided against in the contract, and still more if they might have been prevented, the promisor should be held answerable. So, if the impossibility applies to the promisor personally, there being no natural impossibility in the thing, this will not be a sufficient excuse."

A lessee of a house who covenants generally to repair, is bound to rebuild it, if it be burned by an accidental fire.

Bullock v. Dommitt, 6 T. R., 650.
Walton v. Waterhouse, 2 Saund., 420.
Earl of Chesterfield v. Duke of Bolton, Com. Rep., 627.
Taylor on Landlord and Tenant, § 364.

So in the case of a covenant to keep a bridge in repair, the party is *bound to rebuild* the bridge though broken down by an unusual and extraordinary flood.

Brennock Co. v. Pritchard, 6 T. R., 750.

So as to a covenant by a lessee to sustain and repair the banks of a river, where, by "a great, outrageous and sudden flood," the "banks were decayed and perished."

Dyer, 33*a*, pl. 10.

So, where a man contracted to deliver "prime" "first chop" teas, it is no defense that the season was unfavorable.

Gilpins v. Consequa, Peters, Circ. Ct., 86.

And where a carrier contracts to deliver within a certain number of days, and is unable to deliver within that time, because a canal was rendered impassable by an *unusual freshet*, this was held no excuse for the delay.

Harmony v. Bingham, 12 N. Y., 99.

And see, to same effect, as to *storms at sea*—
Shubrick v. Salmond, 3 Burr, 1637.

Where a charterer agreed to load a ship at Gibraltar with a homeward cargo, and a pestilent disease broke out there, and *all public intercourse was forbidden by law*, held no defense.
Barker v. Hodgson, 3 Maule & Selwyn, 271.

So where a charterer agreed to load a ship at a Russian port with barley, and the Russian government prohibited the exportation of barley—held, no defense.
Blight v. Page, 3 B. & P. 295 *n*.

And see to same effect the well-considered opinion of Mr. Justice Swayne in an analogous case in this Court.
The Harriman, 9 Wall., 161.

In that case the result of the authorities is thus stated:

"The principle deducible from the authorities is, that if what is agreed to be done is lawful and possible, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. *It must be shown that the thing cannot by any means be effected.* Nothing short of this will excuse non-performance. The answer to the objection of hardship in all such cases, is that it might have been *guarded against by a proper stipulation*. It is the province of Courts to enforce contracts—not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function" (*pp.* 172, 173).

The law on this subject was laid down in the case of *Paradine v. Jane* (Alleyn, 26), where, to an action of debt for rent, the defendant pleaded that a certain German Prince, by name Prince Rupert, an alien born, enemy to the king and kingdom, had invaded the realm with an hostile army of men and expelled defendant from possession, whereby he could not take the profits. The plea was held bad on demurrer. "And this difference was taken, that *where the law creates a duty or charge*, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest or by enemies, the lessee is excused (Dyer 33 *a*, Inst. 53 *d;* 283 *a*, 12 H. 4. 6). So of an escape (Co. 4. 84 *b*. 33 H. 6. 1). So in

9 E. 3. 16, a supersedeas was awarded to the Justices, that they should not proceed in a cessavit upon a cesser during the war. *But when the party, by his own contract, creates a duty or charge upon himself*, he is *bound to make it good*, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it (Dyer 33 *a*, 40 E 3. 6 *h*)."

And see—

The Harriman, 9 Wall, 161..
Knowles v. Dabney, 105 Mass., 437.
Atkinson v. Ritchie, 10 East., 530.
Hadley v Clarke, 8 T. R., 259.
Beebe v. Johnson, 19 Wend., 500.
Angell on Carriers, § 294.

The present is not a case where the performance of the contract is made *unlawful*, and where the contract is thereby rendered *void* on grounds of public policy. The City of New Orleans has not been *prohibited* by the Thirteenth Amendment to the United States Constitution from levying a tax on slaves. It has simply been *prevented* from levying such a tax by the destruction of the subject matter. It is entirely analogous to the case suggested above, of an Act of the Legislature, in virtue of its police power, requiring all horses to be killed to prevent epidemics. That would not render a tax on horses illegal. It would simply make it impossible.

It follows, then, that this contract of the City of New Orleans would still be binding upon it even if the exact performance was rendered *absolutely impossible* by the abolition of slavery. The city would still be liable to make amends and to carry out its contract as nearly as possible. But the exact performrnce is *not* rendered *impossible*. The promise was to levy a tax of $650,000 a year (a specific sum) on real estate and slaves.

If the value of slaves has been reduced to zero, the real estate remains, and the tax can be levied on that, and must be so levied.

2.

Again, this tax was in the nature of a *specific pledge* of the real estate and slaves.

The city was absolutely obligated to pay the principal and interest of the bonds; but in addition to this obligation, the city was required to give *collateral security*, as it were, to the extent of $650,000 annually, in the shape of real estate and slaves.

Now, if a portion of the property pledged or mortgaged is destroyed, that does not relieve the remainder from liability, even *pro tanto*. If a debtor pledges or mortgages two horses, and one of them dies, the creditor is nevertheless entitled to collect his whole debt out of the proceeds of the remaining horse.

3.

If this bears hardly on the tax payers of the city, it is for the city authorities to right the hardship by an equalizing apportionment of the other taxes imposed by the city for general municipal purposes.

Certainly, the bondholders ought not to suffer.

VII.

But even if the provisions of the Act of 1852 for a special tax to pay the interest and redeem the principal of these consolidated bonds were void, or have been repealed by a valid repealing or amending act, the relator in this case would nevertheless be entitled to a mandamus to compel the levy of a tax to pay its over-due coupons.

In the absence of any special or express authority to levy a tax to pay municipal obligations, such authority *is implied by the fact that the Legislature authorizes the obligations to be issued.* This implied authority forms *part of the contract* with the bondholders; it cannot be restricted or impaired by subsequent legislation, and the collection of the tax will be enforced by mandamus.

All these points were ruled by this Court most distinctly and unequivocally in *United States v. New Orleans* (98 U. S., 381).

In that case judgment had been obtained against the city on certain bonds issued by the city in aid of a certain railroad. The statute authorizing their issue was silent as to the method of payment of the principal, and gave no express authority to tax for that purpose. By subsequent legislation the general power of taxation by the city had been restricted, and by section 7 of the Act of 1876 (*the very act on which the defendants in error rely in the case at bar*), it was provided that "*no tax for the payment of bonds or interest on bonds,* other than that authorized by the preceding sections, shall be levied, either for the year 1876 or any year or years thereafter, by the City of New Orleans, * * * and it shall be, hereafter, *incompetent for any Court to mandamus* the officers of said city to levy and collect any interest tax, other than that provided in this act."

This Court *held* that the power of taxation is vested in municipial corporations as an essential attribute for all the purposes of their existence, unless its exercise be in express terms prohibited. Where they have been vested with authority to borrow money or incur an obligation, *they have the power to levy a tax to pay the obligation, without any special mention that such power is granted.* And the Court directed a *mandamus* to isssue for the payment of the judgment, *notwithstanding the prohibition of the Act of 1876.*

See also *Loan Association* v. *Topeka*, 20 Wall., 660.
Commonwealth v. Commissioners of Allegheny County, 37 Penn. St., 277.
Same v. Same, 40 Penn. St., 348.
Same v. Same, 43 Penn. St., 403.
Lowell v. Boston, 111 Mass., 460.
Coy v. City Council of Lyons City, 17 Iowa, 1.
Madison County Court v. Alexander, 1 Walker (Miss.), 523.
Gibbons v. Mob. and Gt. No. R. R. Co., 36 Ala., 439.
Ex Parte Selma and Gulf R. R. Co., 45 Ala., 730.
City of Chicago v. Hasley, 25 Ills., 595.
Hasbruck v. Milwaukee, 25 Wis., 122.
Ex Parte Parsons, 1 Hughes, 282.

It is now also firmly established in this Court that the provision for a special tax in an act authorizing the issue of bonds, is not alone exclusive of other general modes of payment, but the general obligation of the county or city to pay its debts subsists independently of the special tax—unless the act contains express words of exclusion—and may be resorted to whenever the special tax fails to meet the full obligation of the bonds.

United States v. Clark Co., 96 U. S., 211.

In the last cited case the act authorizing the issue of the bonds provided for a special tax "not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year," but contained no provision that only the fund derived therefrom should be applied to their payment. The special tax proving inadequate to pay the interest, the relator applied for a *mandamus* to compel the County Court to draw a warrant on the County Treasurer to pay the unpaid balance of his interest out of the general funds of the county.

It was very earnestly contended that the bondholders' only claim was upon the special tax.

This Court, in an elaborate opinion by Mr. Justice Strong, held that the special tax was in no sense exclusive of the the general obligation to pay, and that after exhausting the special tax the creditor could have recourse to the general funds of the county.

In the present case the majority of the Supreme Court of Louisiana, argue and conclude that the bonds are valid and constitutional, but inasmuch as they hold the special tax invalid, they conclude that there is no obligation to pay which the Courts can enforce.

The case of *United States v. County of Clark* establishes two points:

1st. That in the absence of express exclusive words, the general obligation to pay remains intact.

2d. That in the absence of any express limitation of the aggregate of all taxes, the duty to pay by general taxation may be invoked by the creditor, by *mandamus, until the debt is fully paid.*

Now, then, upon the very showing of the Court below, we have this condition of things, namely: (1) valid bonds; but (2) *an invalid special tax.*

The conclusion of the Court below is that, hence, the creditor has no legal or enforceable remedy.

This is a plain error according to the doctrine of this Court.

If, for any cause, the special tax fails, the creditor holding a valid obligation is entitled to demand payment out of or by means of a general tax, and in the absence of any express limitation existing at the time his securities were issued, upon the power to lay general taxes, he is entitled to a tax sufficient to pay his debt in full, wholly irrespective of the special tax.

In the 37th section of the Act of 1852 we shall find no words restricting the creditor's rights or the city's obligation, to the special tax.

In 1852 there was no limit upon the power of the City of New Orleans to tax for general purposes.

Is there, then, any escape from the conclusion that the relator here, even if the special tax required by the Consolidation Act of 1852 is wholly invalid, is unquestionably entitled to ask a general tax sufficient to pay his overdue coupons in full.

It need not be said that no subsequent limitation to the city's power of general taxation can affect this question. Such subsequent limitation is wholly void so far as it injuriously affects bonds previously issued.

The case of *Maenhaut v. New Orleans* (2 Woods, 108, and 3 Woods, 1), is deserving of special consideration.

This was a bill in equity filed on behalf of certain consolidated bondholders, praying a decree that the complainants are entitled: (1) to a specific performance of their contract with the city contained in section 37 of the Act of 1852; (2) to the levy, collection and exclusive application to the payment of the principal and interest of their bonds of the sum of $650,000, to be levied upon the real estate of the city; (3) to a priority of payment out of the taxes raised by the city upon real estate, to the extent of $650,000, and (4) to an injunction restraining the city from applying any of its resources raised, or hereafter to be raised by levy on real estate, to the payment of any other debt or demand until complainants' claims, as bondholders, have been fully provided for and satisfied.

3 Woods, 3.

Upon the motion for a preliminary injunction (2 Woods, 108), Judge Woods delivered an opinion, in which he says:

"There can be no serious question that so much of the 37th section of the Act of 1852 as provided for the manner in which the tax to pay the consolidated bonds is to be levied, and the safeguards for the levy and collection of the tax, *constitute a contract with the bondholder*, the substantial performance of which he is entitled to exact."

Citing many cases.

Again he says (p. 114): "In the argument upon the motion for an injunction, it was claimed by counsel for the city that the Act of 1852 was in violation of the Constitution of 1845, which was in force when that act was passed, and which declared (Art. 127), 'that taxation shall be equal and uniform throughout the State.' The provision of the Act of 1852, which is deemed to contravene this constitutional requirement, is this: 'The rate per cent. of said tax (tax to pay interest on consolidated debt) in each municipality shall be in proportion to the indebtedness of each.' *I cannot see any conflict between the law and the Constitution.* As at present advised, I do not think the objection to the law well founded."

On the final hearing of the same case (3 Woods, 1), the Court says:

"So far as the first two of these demands of the complainant are concerned, I am of opinion that the act of 1852, above mentioned, contains a contract valid and binding on the city, and that the bondholders are entitled to exact the substantial performance of the contract. I have so held upon the former hearing of the case (2 Woods, 108)."

"The 37th section of the Act of 1852, constituting, as it does, a contract between the city and the bondholders, *stands unaffected by any subsequent legislation that seeks to impair or repeal its provisions.* But the remedy of the complainants to enforce their contract is clearly not in equity, but at law, by the recovery of a judgment on their coupons and bonds, and by the writ of *mandamus* commanding the levy and collection of the tax required by law. The relief at law is plain, adequate and complete, and equity cannot be resorted to (*Heine v. Levee Commissioners*, 19 Wall., 655)."

It has been said that all this is mere *dicta*. We do not so regard it. It was essential to the decision to be rendered in

Maenhaut v. New Orleans, that the Court should find (1), whether or not there was a contract between the city and the bondholders, and also (2), whether the contract, so far as it related to the levy and collection of the special tax, was constitutional or not, as regards the State Constitution.

Judge Woods determines both these issues in favor of the bondholders, and his conclusions upon these points are authority.

VIII.

The attempted repeal of the right to the writ of mandamus, by the Act of 1876, already quoted, can have no effect whatever upon the powers or duties of the United States Courts, nor upon the contract when sought to be enforced in the State Courts.

It is claimed that the remedy by *mandamus* is taken away by the Act of 1876, and therefore the relator here cannot obtain the relief prayed for.

(*a*) *This very act* was relied upon by the city in the case of *United States v. New Orleans* (98 U. S., 381). The Court dismisses this act without a word, as having no possible bearing upon the subject; and *directed the mandamus to issue.*

(*b*) It is the settled doctrine of this Court that the remedies existing at the time a contract is entered into form an essential part of that contract, and cannot afterwards be changed so as to impair or diminish the binding force or value of the contract.

Green v. Biddle, 8 Wheat., 1.
Mason v. Haile, 12 Wheat., 370.
Bronson v. Kinzie, 1 How., 315.
Curran v. Arkansas, 15 How., 304.
Walker v. Whitehead, 16 Wall., 314.
Edwards v. Kearzey, 96 U. S., 595.

The only ground on which a change of remedy is per-mitted is, that a new remedy be substituted which shall be an adequate and equivalent one.

In the present instance no remedy whatever is substituted for that of *mandamus*. The act attempts a bald repeal of the remedy by *mandamus*.

(*c*) The case of *Tennessee v. Sneed* (96 U. S., 69) is not an authority in favor of the city in this case.

That case, though the decision is put chiefly on the ground that the new remedy was adequate and fully equivalent, in value and convenience, to the old, was, in fact, similar to the cases of *Railroad Co. v. Tennessee* (101 U. S., 337) and *Railroad Co. v. Alabama* (101 U. S., 832).

In the latter case, the Chief Justice states the point decided very clearly and concisely. He says that these cases present the question of the constitutionality of a law taking away *the right to sue a State* on its contracts. The statutes granting the right gave *no real power to the Courts to enforce their judgments*, and hence the repeal of the statutes impaired no substantial right.

IX.

It is suggested that the relator ought to have obtained a judgment against the city before applying for his mandamus.

To this there are three answers:

1. No such point was made by the Supreme Court of Louisiana in its opinion. On the contrary, they assume that the proceeding was regular in this respect, if the city was bound to levy the tax.

2. The Supreme Court of Louisiana assumed (see opinion in record, pp. 34 to 38) that in the absence of prohibitory acts passed since the Act of 1852, the writ of *mandamus* would have been the appropriate remedy. If so, that remedy cannot be taken away by such prohibitory Acts.

3. If we are right in our claim that the provision of the Act of 1852, as to the annual levy of $650,000 for payment of interest and redemption of principal was *a part of the contract*, that provision can only be enforced by this proceeding. We ask, not only that the overdue interest on our own bonds shall be paid, for which we could obtain judgment, but *that the city shall carry out its contract, and shall levy the $650,000 tax to pay all interest and redeem outstanding bonds.* A judgment on our own coupons would not give us any better right to ask this. We claim *a right, as couponholders, whether our coupons are due or not due, to call upon the city officers to perform their duty, and to levy the required tax.*

We have a direct pecuniary interest in having this duty performed, and the writ of *mandamus* is the appropriate remedy.

This proceeding having been taken in the State Court,—the objection cannot be taken which would have been available in the United States Courts, namely, that the writ of *mandamus* directed to State or municipal authorities, can only be asked for in the Federal Courts in aid of jurisdiction otherwise acquired. The State Court had undoubted authority to issue the writ.

Burroughs, in his work on Taxation (p. 453), says: "There is an exception to the rule that judgment must be first obtained before an application for a *mandamus* will be entertained. It is in that class of cases where, by the statute creating the debt, as in the case of bonds in aid of railroads, it is made the duty of certain officers to levy a tax for the purpose of paying such bonds. Here there is a clear legal duty upon the officers to make the levy, and there is no other remedy for a failure to perform such duty but a *mandamus*, and there is no necessity for a judgment to ascertain the amount due."

See High on Extr. Rem., §§ 382, 387, 389.

In *State v. Commissioners of Clinton County*, 6 Ohio St., 280, it was *held* that the holders of certain county bonds, were entitled to a *mandamus* to compel the county authorities *to levy* mitted is, that a new remedy be substituted which shall be an adequate and equivalent one.

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In *State v. Commissioners of Clinton County*, 6 Ohio St., 280, it was *held* that the holders of certain county bonds, were entitled to a *mandamus* to compel the county authorities *to levy* *a tax for the whole amount of interest due*, (not only for the interest due relators), and this without any judgment.

See also to same effect :

Commonwealth v. Pittsburgh, 34 Penn. St., 496.
Commonwealth v. Commissioners of Allegheny, 37 Penn. St., 277.
Stevenson v. District Township of Summit, 35 Iowa, 471.
State v. City of Davenport, 12 Iowa, 335.
Flagg v. Mayor of Palmyra, 33 Mo., 440.
Maddox v. Graham, 2 Metc. (Ky.), 56.
Pegram v. Commissioners of Cleveland County, 64 N. C., 557.
County Commissioners of Columbia County v. King, 13 Fla., 451.

X.

We can see no remaining ground of opposition to the present demand of the relator, which requires notice.

Our main positions in this brief are two:

First. That the special tax provided by the Act of 1852, is valid and constitutional, and, constituting an essential part of our contract, we are entitled to demand now a substantial enforcement of it.

Second. That assuming the validity of the bonds and the invalidity of the special tax, as is done by the Court below, we are still entitled to a tax, irrespective of the special tax, sufficient to meet the obligations of our bonds.

The judgment of the Supreme Court of Louisiana should be reversed, with costs, and a writ of mandamus directed to issue as prayed for.

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